HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

NAGV and NAGW of 2002 APPELLANTS

AND

MINISTER FOR IMMIGRATION AND
MULTICULTURAL AND INDIGENOUS AFFAIRS
& ANOR RESPONDENTS

NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] HCA 6
2 March 2005
S187/2004

ORDER

1. *Appeal allowed.*

2. *First respondent pay the appellants' costs.*

3. *Set aside the orders of the Full Court of the Federal Court of Australia made on 27 June 2003 and in their place order:*

   (a) the appeal to that Court is allowed;

   (b) first respondent pay the appellants' costs;

   (c) set aside the order of Stone J made on 27 November 2002 and in its place order:

      (i) order absolute for a writ of certiorari directed to the second respondent, quashing the decision of the second respondent dated 1 March 2002 in matter N99/29907;

      (ii) order absolute for a writ of mandamus directed to the second respondent, requiring the second respondent to determine according to law the application for review of the decision of the delegate of the first respondent dated 3 September 1999;

(iii) first respondent pay the appellants' costs of their application under s 39B of the Judiciary Act *1903 (Cth).*

On appeal from the Federal Court of Australia

Representation:

J Basten QC with J A Gibson and I Ryan for the appellants (instructed by Craddock Murray Neumann)

N J Williams SC with S B Lloyd for the first respondent (instructed by Clayton Utz)

CATCHWORDS

NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs

Immigration – Refugees – Refugee Review Tribunal – Decision – Judicial review – Tribunal found that appellants had genuine fear of persecution if returned to Russia – Tribunal concluded that Israel was a third country where appellants would have effective protection – Protection visa refused – Whether the Tribunal failed to observe the requirements in ss 36 and 65 of the *Migration Act* 1958 (Cth) – Whether each appellant was a non-citizen in Australia to whom Australia has protection obligations under the Convention Relating to the Status of Refugees as amended by the Protocol Relating to the Status of Refugees – Whether this means anything other than "refugee" within the meaning of Art 1 of the Convention Relating to the Status of Refugees as amended by the Protocol Relating to the Status of Refugees.

Immigration – Refugees – International law – Construction of the Convention Relating to the Status of Refugees as amended by Protocol Relating to the Status of Refugees – Whether a non-refoulement obligation precludes removal to a safe third country.

Words and phrases – "protection obligations", "to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol".

Migration Act 1958 (Cth), ss 36 and 65.
Convention Relating to the Status of Refugees as amended by Protocol Relating to the Status of Refugees, Arts 1, 32 and 33.

1 GLEESON CJ, McHUGH, GUMMOW, HAYNE, CALLINAN AND HEYDON JJ. The appellants entered Australia on 17 June 1999. They are citizens of the Russian Federation, and respectively are father and son, born in what was then the USSR in 1962 and 1982. The father qualified as a medical practitioner in the USSR in 1985. The other child of his marriage, a daughter, was with her mother in Lithuania at the time of the hearing before the second respondent, the Refugee Review Tribunal ("the RRT")[1]. The RRT found that the appellants have a genuine fear that if they returned to Russia they would be persecuted because they are Jews and because of the first appellant's political activities and opinions.

Thiyagarajah

2 However, on 1 March 2002 the RRT affirmed the decision of a delegate of the first respondent ("the Minister") to refuse to grant to the appellants protection visas under the *Migration Act* 1958 (Cth) ("the Act"). The RRT did so with reference to the decision of the Full Court of the Federal Court in *Minister for Immigration and Multicultural Affairs v Thiyagarajah*[2]. That decision was reversed on appeal to this Court, but on grounds not immediately material[3].

3 In this case, the RRT proceeded on the footing that:

> "[g]enerally speaking, Australia will not have protection obligations under [the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 and the Protocol Relating to the Status of Refugees done at New York on 31 January 1967 (together 'the Convention')] where an applicant for refugee status has 'effective protection' in a country other than that person's country of nationality, that is a third country".

4 The ground of decision by the Full Court in *Thiyagarajah* which was applied by the RRT in this passage is that stated by von Doussa J[4]:

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1 The RRT was added as second respondent by order made at the hearing of this appeal.

2 (1997) 80 FCR 543.

3 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343.

4 (1997) 80 FCR 543 at 565.

> "As a matter of domestic and international law, Australia does not owe protection obligations to the respondent as he is a person who has effective protection in France which has accorded him refugee status. Moreover, when his application for a protection visa was determined by the RRT, he had been a resident in France for a long period, he had the right to apply for citizenship in France, and he held travel documents that entitled him to return to France. These added matters are not essential to the finding that Australia did not owe him protection obligations, but serve to illustrate that the respondent's claim for protection is far removed from the object and purpose of [the Convention]."

His Honour had remarked earlier in his reasons that, provided France was able to provide effective protection, "it was not inconsistent with the obligations owed by Australia as a Contracting State to effect [the respondent's] deportation from Australia without considering the substantive merits of a claim to refugee status"[5]. But the starting point of this reasoning had been the proposition that, in enacting s 36(2) of the Act, the Parliament had introduced as a criterion for the grant of a protection visa the existence of "protection obligations" owed by Australia under the Convention, in particular under Art 33[6].

5 It is this reasoning and the construction of the Act upon which it depends that the appellants challenge in this Court.

The RRT decision

6 The RRT concluded that Israel was a third country in which the appellants would have effective protection. The RRT was satisfied that if the appellants had travelled to Israel they most probably would have been allowed to enter and reside there, that there was no evidence that there would be a risk of the appellants being returned from Israel to Russia, and that there was no evidence supporting a conclusion that they had a well-founded fear of persecution in Israel. Further, it was probable that the appellants would still have access to the effective protection of Israel if they now were to travel there.

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5 (1997) 80 FCR 543 at 563.

6 (1997) 80 FCR 543 at 556.

7 The first appellant's wife is not Jewish and the family had rejected the option of moving to Israel. This was partly because of an apprehension that families of mixed marriages were subject to discrimination and because compulsory military service in Israel would conflict with the pacifist upbringing of the children of the marriage. However, the RRT was not satisfied that those reasons were relevant to the consideration of whether the appellants would have effective protection in Israel.

The Federal Court

8 By application instituted in the Federal Court on 24 April 2002, the appellants sought relief under s 39B of the *Judiciary Act* 1903 (Cth) ("the Judiciary Act"). The relief sought included certiorari to quash the decision of the RRT, prohibition restraining the Minister from acting upon that decision and mandamus requiring the RRT to reconsider the application for review. The application was dismissed by Stone J and an appeal to the Full Court (Finn and Conti JJ; Emmett J dissenting) was dismissed[7].

9 The Full Court accepted that, if the appellants' case otherwise were made out, there had been a failure to observe the requirements in ss 36 and 65 of the Act with respect to the issue of protection visas and thus jurisdictional error to which the privative clause provisions of the Act did not apply[8]. Further, all members of the Full Court agreed that the previous Full Court decision in *Thiyagarajah* was wrongly decided[9]. Detailed reasons for that conclusion were given by Emmett J. However, Finn and Conti JJ concluded, with Emmett J dissenting, that it would be inappropriate for the Full Court now to depart from what hitherto and in many decisions after *Thiyagarajah* had been regarded as settled law[10]. Hence the grant of special leave to appeal to this Court.

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7 *NAGV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 46.

8 (2003) 130 FCR 46 at 67, 68.

9 (2003) 130 FCR 46 at 48, 64, 68.

10 (2003) 130 FCR 46 at 48-49 per Finn J, 68 per Conti J.

The form of the legislation

10 It is necessary to begin with the provisions of the Act referred to above, namely ss 36 and 65. In doing so, it should be noted that the relevant form of the Act predates the changes made to s 36 with respect to "protection obligations" by Pt 6 of Sched 1 to the *Border Protection Legislation Amendment Act* 1999 (Cth) ("the 1999 Act")[11]. Part 6 (Items 65-70) is headed "Amendments to prevent forum shopping". The amendments made by the 1999 Act do not apply to applications for a visa made before 16 December 1999[12]. The application made by the appellants for protection visas was lodged on 16 July 1999.

11 In its relevant form, s 36 stated:

> "(1) There is a class of visas to be known as protection visas.
>
> (2) A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under [the Convention]."

Section 65(1) obliges the Minister to grant the visa if satisfied that the criterion described by s 36(2) is met, along with other criteria identified in s 65(1). It has not been suggested that the appellants failed in the other criteria; the decision of the RRT turned upon its construction of s 36(2).

12 For the reasons later set out, the RRT erred in its construction of s 36(2). As a result, the appellants should have the orders for certiorari and mandamus directed to the RRT which they seek in their Amended Notice of Appeal. No order now is sought for prohibition against the Minister.

The Act and international law

13 Something first should be said respecting the means by which consideration of the Convention has been drawn into Australian municipal law.

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11 Sched 1, Item 65. See *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 78 ALJR 1156 at 1159 [9]-[10], 1160-1161 [18]-[19]; 208 ALR 201 at 204, 206.

12 Item 70.

14 First, customary international law deals with the right of asylum as a right of states not of individuals; individuals, including those seeking asylum, may not assert a right under customary international law to enter the territory of a state of which that individual is not a national[13].

15 Secondly, the Convention is an example of a treaty which qualifies what under classical international law theory was the freedom of states in the treatment of their nationals[14]; but the Convention does not have the effect of conferring upon the refugees to which it applies international legal personality with capacity to act outside municipal legal systems[15].

16 Thirdly, the Convention was negotiated and agreed between the relevant Contracting States and obligations are owed between those states[16], not to refugees, so that it is at a state level that the Convention has to be understood[17]. Fourthly, the Convention has been construed by the House of Lords[18] and the

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13 *T v Home Secretary* [1996] AC 742 at 754; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 272-275; *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 4 [1], 45 [137], 72 [203].

14 Menon, "The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine", (1992) 1 *Journal of Transnational Law and Policy* 151 at 154-156; Orakhelashvili, "The Position of the Individual in International Law", (2001) 31 *California Western International Law Journal* 241 at 242-243.

15 See Orakhelashvili, "The Position of the Individual in International Law", (2001) 31 *California Western International Law Journal* 241 at 253-256.

16 Article 38 provides for any dispute between parties to the Convention, which relates to its interpretation or application and cannot be settled by other means, to be referred to the International Court of Justice at the request of any one of the parties to the dispute.

17 *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 294; *Horvath v Secretary of State for the Home Department* [2001] 1 AC 489 at 508; *Minister for Immigration and Multicultural Affairs v Haji Ibrahim* (2000) 204 CLR 1 at 46-47 [139].

18 *T v Home Secretary* [1996] AC 742 at 753-754.

Supreme Court of the United States[19] as not detracting from the right of a Contracting State to determine who should be allowed to enter its territory. Fifthly, the text of the Convention speaks, as Brennan J pointed out in *Minister for Immigration and Ethnic Affairs v Mayer*[20], indifferently of a person who is "considered a refugee" and of one to whom the "status of refugee [is] accorded" for the purposes of the Convention.

17 Sixthly, Gibbs CJ and Brennan J in *Mayer*[21] and Stephen J in *Simsek v Macphee*[22] pointed out that the determination of the status of refugee is a function left by the Convention to the competent authorities of the Contracting States which may select such procedures as they see fit for that purpose; as will appear, the procedures adopted by Australia have varied from time to time.

18 Other Contracting States in their migration laws have adopted in different ways criteria drawn from the Convention. The legislative methods adopted in New Zealand, Canada, the United Kingdom and the United States, which differ each from the others and from that of Australia, may be seen respectively from the reports of *Attorney-General v Refugee Council of New Zealand Inc*[23], *Pushpanathan v Canada (Minister of Citizenship and Immigration)*[24], *T v Home Secretary*[25] and *Sale v Haitian Centers Council, Inc*[26]. It appears that in at least some of these countries the legislation has been amended since the decisions in the above cases by specific provision respecting "safe third countries"[27].

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19 *Sale v Haitian Centers Council, Inc* 509 US 155 at 179-183 (1993).

20 (1985) 157 CLR 290 at 305.

21 (1985) 157 CLR 290 at 294, 305.

22 (1982) 148 CLR 636 at 643.

23 [2003] 2 NZLR 577 at 601-602.

24 [1998] 1 SCR 982 at 997-1000.

25 [1996] AC 742 at 759-760.

26 509 US 155 at 170-171 (1993).

27 United States Code Annotated, Title 8, Aliens and Nationality, §1158(a)(2)(A); *Asylum and Immigration (Treatment of Claimants, etc) Act* 2004 (UK), s 33.

19 Seventhly, as the title to the Convention suggests[28], the Convention details the status and civil rights to be afforded within Contracting States to those accorded the status of refugee. These matters are to be seen from the detail in Ch 2 (Arts 12-16, headed "Juridical Status"), Ch 3 (Arts 17-19, headed "Gainful Employment"), Ch 4 (Arts 20-24, headed "Welfare") and Ch 5 (Arts 25-34, headed "Administrative Measures"). Chapter 5 deals with such matters as the issue of identity papers (Art 27) and travel documents (Art 28).

20 However, the Contracting States accept significant obligations under Art 32 (headed "Expulsion") and Art 33 (headed "Prohibition of Expulsion or Return ('*Refoulement*')"). Article 32(1) states[29]:

> "The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."

Article 33(1) states:

> "No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

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28 Convention Relating to the Status of Refugees.

29 Articles 32(2) and 32(3) qualify and explain the procedures for that expulsion as follows:

> "(2) The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
>
> (3) The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary."

21 In *Sale*[30], the Supreme Court of the United States construed Art 33(1) by reading "expulsion" as referring to a refugee already admitted into a Contracting State and "return" as referring to a refugee already within the territory of a Contracting State but not yet resident there. On the other hand, Professor Shearer has emphasised the distinction between the two articles, writing[31]:

> "These Articles are of a distinctly different character. The first assumes the prior admission of the refugee to a status of lawful residence, and refers to expulsion per se, and not to the institutionalised procedure of extradition. The second, however, not only applies to refugees whether lawfully or unlawfully within the host territory, but also embraces all measures of return, including extradition, to a country where their lives or freedom would be threatened."

The Minister's submissions

22 It is unnecessary for this appeal to determine all these matters of construction of the Convention. The Minister accepts that Australia has an international obligation under Art 33(1) not to expel or return the appellants in any manner whatsoever to the frontiers of the Russian Federation, being their country of nationality, or to the frontiers of any other territory where their life or freedom would be threatened in the sense spoken of in that Article.

23 Counsel for the Minister also accepts that there is implicit in that negative proposition drawn from Art 33(1) a positive obligation to permit the appellants to remain in Australia. The Minister thus adopts the proposition stated by a commentator[32]:

> "[I]f a State is bound by a non-refoulement obligation with respect to a given individual, and there is no place to which that individual can be removed without the obligation being breached, the State in question has

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30 509 US 155 at 182 (1993).

31 "Extradition and Asylum", in Ryan (ed), *International Law in Australia*, 2nd ed (1984) 179 at 205.

32 Taylor, "Australia's 'Safe Third Country' Provisions: Their Impact on Australia's Fulfillment of Its Non-Refoulement Obligations", (1996) 15 *University of Tasmania Law Review* 196 at 200-201.

> no choice but to tolerate that individual's presence within its territory. In these circumstances, fulfillment of the non-refoulement obligation through time is functionally equivalent to a grant of asylum."

24 However, the Minister submits that this positive obligation to grant asylum is qualified in a fashion fatal to the appellants' case under the Act. The asserted qualification is that, if Australia assesses a third state, here Israel, as being one which will accept the appellants, allow them to enter and to remain, and not "*refoule*" them to a country of persecution, then there is no international obligation to permit the appellants to remain in Australia, even though they answer the definition of the term "refugee" in Art 1 of the Convention.

25 The Minister claims support from an opinion in which Sir Elihu Lauterpacht joined[33]:

> "Article 33(1) cannot, however, be read as precluding removal to a 'safe' third country, ie one in which there is no danger [that he or she might be sent from there to a territory where he or she would be at risk]. The prohibition on *refoulement* applies only in respect of territories where the refugee or asylum seeker would be at risk, not more generally. It does, however, require that a State proposing to remove a refugee or asylum seeker undertake a proper assessment as to whether the third country concerned is indeed safe."

26 It is accepted that the appellants answer the definition in Art 1. The issue on this appeal does not turn immediately upon the content of Australia's international obligations respecting the appellants under Art 33(1) of the Convention. The Convention is of determinative importance for this appeal only insofar as it or its particular provisions are drawn into municipal law by adoption as a criterion of operation of s 36(2) of the Act.

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33 Lauterpacht and Bethlehem, "The scope and content of the principle of *non-refoulement*: Opinion", in Feller, Türk and Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, (2003) 87 at 122.

Section 36(2) of the Act

27 Section 36(2) is awkwardly drawn. Australia owes obligations under the Convention to the other Contracting States, as indicated earlier in these reasons. Section 36(2) assumes more than the Convention provides by assuming that obligations are owed thereunder by Contracting States to individuals. Beginning with that false but legislatively required step, the appeal turns upon the meaning of the adjectival phrase "to whom Australia has protection obligations under [the Convention]".

28 Counsel for the Minister submits that the Minister has no "protection obligation" in the nature of providing asylum to the appellants because the implication of that positive obligation does not flow from Art 33(1); there is the availability of Israel as a safe and permanent destination in the sense discussed. This conclusion as to the operation of the Convention is then translated into the terms of s 36(2) by saying that Australia has no "protection obligations" to the appellants because it would not be a breach of Australia's international obligations under the Convention to send the appellants to Israel.

29 Consideration of the use in s 36(2) of the plural "protection obligations" discloses a *non sequitur* in the reasoning for which the Minister contends. Australia owed an obligation in respect of the appellants not to return them to the Russian Federation or to the frontiers of any other territories where their life or freedom would be threatened in the manner identified in Art 33(1). That is not disputed. From the circumstance that Australia might not breach its international obligation under Art 33(1) by sending the appellants to Israel, it does not follow that Australia had no protection obligations under the Convention.

30 Acceptance of the Minister's submissions respecting the significance of the access of the appellants to Israel would have significant and curious consequences for the operation of the Convention, given the events in Europe which preceded its adoption. In *NAEN v Minister for Immigration and Multicultural and Indigenous Affairs*[34], Sackville J referred to the enactment by Israel of the Law of Return in 1950, before the adoption of the Convention in 1951; his Honour said it would be "an exquisite irony" if from the very commencement of the Convention it had not obliged Contracting States to afford protection to Jewish refugees because they might have gone to Israel instead.

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34 [2003] FCA 216 at [74].

31 Further, as Emmett J correctly emphasised in the Full Court[35], a perusal of the Convention shows that, Art 33 apart, there is a range of requirements imposed upon Contracting States with respect to refugees some of which can fairly be characterised as "protection obligations". Free access to courts of law (Art 16(1)), temporary admission to refugee seamen (Art 11), and the measure of religious freedom provided by Art 4 are examples.

32 However, there is a more immediate answer to the Minister's case. Section 36(2) does not use the term "refugee". But the "protection obligations under [the Convention]" of which it does speak are best understood as a general expression of the precept to which the Convention gives effect. The Convention provides for Contracting States to offer "surrogate protection"[36] in the place of that of the country of nationality of which, in terms of Art 1A(2), the applicant is unwilling to avail himself[37]. That directs attention to Art 1 and to the definition of the term "refugee".

33 Such a construction of s 36(2) is consistent with the legislative history of the Act. This indicates that the terms in which s 36 is expressed were adopted to do no more than present a criterion that the applicant for the protection visa had the status of a refugee because that person answered the definition of "refugee" spelled out in Art 1 of the Convention.

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35 (2003) 130 FCR 46 at 60.

36 See *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 78 ALJR 678 at 683 [20]; 205 ALR 487 at 492.

37 Section A(2) states:

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling *to avail himself of the protection of that country*; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it". (emphasis added)

The Convention and Australian statute law

34 Australia was the sixth state to ratify or accede to the Convention Relating to the Status of Refugees, doing so on 22 January 1954 with effect from 22 April 1954[38]. It acceded to the Protocol Relating to the Status of Refugees on 13 December 1973, with effect from that date[39]. Reservations by Australia to Art 28(1) and Art 32 were withdrawn in 1971 and 1967 respectively[40].

35 However, in *Simsek*[41], Stephen J applied the accepted general proposition[42] that in the absence of legislation the Convention had no legal effect in Australian municipal law upon the rights and duties of individuals and of the Commonwealth[43]. Before the addition to the Act of s 6A by the *Migration Amendment Act (No 2)* 1980 (Cth)[44], the determination of whether a person had the status of a refugee was a matter within the discretion of the Executive; by administrative arrangements responsibility had been allotted to the Minister for Immigration and Ethnic Affairs assisted by an Interdepartmental Committee[45].

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38 *Australian Treaty Series*, (1954), No 5.

39 *Australian Treaty Series*, (1973), No 37.

40 *NAGV v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 130 FCR 46 at 69.

41 (1982) 148 CLR 636 at 641-643.

42 See, for qualifications to the common law doctrine, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 33-34 [100]-[102], 38 [122], 47-48 [147].

43 By way of contrast, the State Parties to the (First) Optional Protocol to the International Covenant on Civil and Political Rights, which entered into force for Australia on 25 December 1991 (*Australian Treaty Series*, (1991), No 39), recognise the competence in certain circumstances of the Human Rights Committee, set up under the Covenant, to receive and consider claims by individuals.

44 s 6.

45 *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 290 at 300-301.

36 Section 6A(1) provided that an entry permit was not to be granted to a non-citizen after entry into Australia unless one or more of the conditions then set out was fulfilled. One of those conditions, contained in par (c), was that the non-citizen "is the holder of a temporary entry permit which is in force and the Minister has determined, by instrument in writing, that he has the status of refugee within the meaning of [the Convention]". *Mayer* determined that s 6A impliedly conferred on the Minister the function of determining whether an applicant had the status of "refugee", with the result that the determination was made "under an enactment" as required by s 13(1) of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). Section 6A was repealed by the *Migration Legislation Amendment Act* 1989 (Cth)[46], but the new provision[47] was drawn in similar terms to s 6A(1)(c).

37 Legislation in a form with no material differences to that of s 36 as it falls for consideration in this litigation was first introduced (as s 26B) by the *Migration Reform Act* 1992 (Cth) ("the Reform Act")[48]. The Act as it stood immediately before the commencement of the relevant provisions of the Reform Act was considered in *Applicant A v Minister for Immigration and Ethnic Affairs*[49]. The Act at that stage still involved the two steps seen in the old s 6A considered in *Mayer*. These were the determination of status and the grant of a visa or permit. Thus, immediately before the commencement of the relevant provisions of the Reform Act, Div 1AA of Pt 2 (ss 22AA-22AD)[50] was headed "Refugees" and s 22AA read:

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46 s 6.

47 Paragraph (d) of s 11ZD(1), renumbered s 47 by the *Migration Legislation Amendment Act* 1989 (Cth), s 35.

48 s 10, which commenced on 1 September 1994.

49 (1997) 190 CLR 225 at 238, 250, 271.

50 Inserted by the *Migration Amendment Act (No 2)* 1992 (Cth), which commenced on 30 June 1992; s 26B did not commence until 1 September 1994 after the lodgment of the applications considered in *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225.

> "If the Minister is satisfied that a person is a refugee, the Minister may determine, in writing, that the person is a refugee."

38 The term "refugee" was defined in s 4 as having "the same meaning as it has in Article 1 of [the Convention]". Regulations made under the Act operated by treating applications for determination of refugee status as also being applications for the grant of the necessary visa[51].

39 This administrative system was changed by the Reform Act with the introduction of s 26B and s 26ZF, the predecessors of s 36 and s 65 respectively. The Reform Act also omitted[52] the definition of "refugee" and repealed[53] Div 1AA of Pt 2, which had contained s 22AA.

40 The Explanatory Memorandum circulated to the House of Representatives with the introduction of the Bill for the Reform Act stated:

> "The Reform Bill makes a *technical change* in the way applications for protection as a refugee are dealt with. In future claimants will not apply separately for recognition as a refugee and permission to stay in Australia. Both processes will be combined in an application for a protection visa." (emphasis added)

The Explanatory Memorandum stated that a protection visa was "intended to be the mechanism by which Australia offers protection to persons who fall under [the Convention]", and continued:

> "In the future persons seeking the protection of the Australian Government on the basis that they are refugees will not apply initially, as now, for recognition as a refugee, but directly for the protection visa. This change is consistent with the general principle contained in the Reform Act that the visa should be the basis of a non-citizen's right to remain in Australia lawfully. *The change will end the present duplication of processing whereby separate applications are required for recognition of*

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51 *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 238, 250, 271.

52 By s 4(b).

53 By s 9.

refugee status and grant of formal authority to remain (presently an entry permit)." (emphasis added)

41 This reference to enhanced administrative efficiency by the combination of previously separate processes merited the description in the Explanatory Memorandum that what was being made was a "technical change". It contained no support for a construction of the new legislation which would supplement and qualify the determination that a person is a refugee, with that term bearing by force of the Act the same meaning as it had in Art 1 of the Convention.

Conclusions

42 Having regard to the subject, scope and purpose of the Reform Act, the adjectival phrase in s 26B(2) (repeated in s 36(2)) "to whom Australia has protection obligations under [the Convention]" describes no more than a person who is a refugee within the meaning of Art 1 of the Convention. That being so and the appellants answering that criterion, there was no superadded derogation from that criterion by reference to what was said to be the operation upon Australia's international obligations of Art 33(1) of the Convention.

43 The previous statutory definition of "refugee" that it had the same meaning as in Art 1 may have involved an ambiguity. If so, it is that ambiguity which was removed by the Reform Act. The possible ambiguity may have been that while s A of Art 1 identifies those to whom the term "refugee" applies, containing in sub-s (2) the well-known "Convention definition", it is the whole of Art 1 which is headed "Definition of the Term 'Refugee'". The reach of s A is qualified by what follows. In particular, s C states that the Convention in certain circumstances "shall cease to apply to any person falling under the terms of section A". Sections D, E and F each state that the Convention or its provisions "shall not apply" to certain persons.

44 In particular, Art 1F states:

"The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:

(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

(c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

45 The possible ambiguity present in the previous statutory definition of "refugee" is apparent from this Court's decision in *Chan v Minister for Immigration and Ethnic Affairs*[54]. A question which arose in *Chan* was whether Art 1 requires refugee status to be determined as at the time when the test laid down by the Convention is first satisfied, so that it ceases only in accordance with the Article of the Convention providing for cessation, or whether refugee status is to be determined at the time when it arises for determination[55]. These distinct conclusions could only be understood to produce different results if s 6A(1)(c) of the Act required regard to be had to only s A of Art 1 of the Convention, and not the cessation provisions in s C. If this was not so, then the distinction held no meaning because an applicant who once fell within the terms of Art 1 would cease to do so by operation of s C of that Article and thus not be entitled to an entry permit under s 6A(1).

46 By contrast, in *Minister for Immigration and Multicultural Affairs v Singh*[56], the Court, in considering s 36(2) of the Act, proceeded on the footing that a decision-maker does not err in law in considering as a preliminary issue whether the applicant for a protection visa falls within an exception in Art 1F.

47 The adoption of the expression "to whom Australia has protection obligations under [the Convention]" removes any ambiguity that it is to s A only that regard is to be had in determining whether a person is a refugee, without going on to consider, or perhaps first considering, whether the Convention does not apply or ceases to apply by reason of one or more of the circumstances described in the other sections in Art 1.

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54 (1989) 169 CLR 379.

55 (1989) 169 CLR 379 at 398.

56 (2002) 209 CLR 533.

48 Something also should be said concerning Art 1E, which provides:

> "This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country."

49 In *Thiyagarajah*[57], the Minister contended to the Full Court that Art 1E on its proper construction excluded from the definition of "refugee" a person having most, if not all, of the rights and obligations attached to the nationality of the host country, there France; the submission was that such an interpretation would be in accordance with the objects and purpose of the Convention, which did not extend to bestowing on a refugee the right to move from country to country, "asylum shopping". Acceptance of that construction would support the actual conclusion of the Full Court in *Thiyagarajah* that the RRT correctly had affirmed the refusal of protection visas to the respondent and his family.

50 The Full Court decided the appeal in *Thiyagarajah* in favour of the Minister but on other grounds. Nevertheless, whilst stating that it was "strictly unnecessary to decide"[58], the Full Court endorsed the interpretation given to Art 1E by Hill J in *Barzideh v Minister for Immigration and Ethnic Affairs*[59], with the qualification that "some disability suffered by an alien might be so slight as to be negligible"[60].

51 Hill J in *Barzideh* had construed Art 1E as follows[61]:

> "I do not think that the Article is rendered inapplicable merely because the person who has de facto national status does not have the political rights of a national. That is to say, the mere fact that the person claiming to be a refugee is not entitled to vote, does not mean that the person does not have

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57 (1997) 80 FCR 543 at 565-566.

58 (1997) 80 FCR 543 at 568.

59 (1996) 69 FCR 417.

60 (1997) 80 FCR 543 at 568.

61 (1996) 69 FCR 417 at 429.

de facto nationality. *But short of matters of a political kind, it seems to me that the rights and obligations of which the Article speaks must mean all of those rights and obligations and not merely some of them.*" (emphasis added)

52 The Full Court in *Thiyagarajah* added that this interpretation was in accordance with the literal meaning of the text[62]. However, the reference to "de facto nationality" as sufficient suggests the contrary.

53 If an issue respecting the construction of Art 1E hereafter arises before the Federal Court, it should not regard further consideration as limited by what was said respecting Art 1E in *Thiyagarajah* and *Barzideh*.

Subsequent legislation

54 The *Migration Legislation Amendment Act (No 4)* 1994 (Cth) added[63] subdiv AI (ss 91A-91F) which was originally headed "Certain non-citizens unable to apply for certain visas"[64]. One of the reasons stated in s 91A for the enactment of this subdivision was the legislative determination that certain non-citizens in relation to whom there was an agreement between Australia and countries including "a safe third country"[65] should not be allowed to apply in Australia for a protection visa. This legislation is an example of a specific response to "asylum shopping"[66]. Its later presence in the Act does not support the Minister's interpretation of the changes earlier made by the Reform Act. Reference must also be made to other changes to the Act.

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62 (1997) 80 FCR 543 at 566.

63 To Div 3 of Pt 2 of the Act.

64 The heading of subdiv AI (which now comprises ss 91A-91G) has since been changed to "Safe third countries".

65 A term defined in s 91D.

66 Further provision of this nature was made (after the appellants had lodged their applications on 16 July 1999) by the 1999 Act. This introduced subdiv AK of Div 3 of Pt 2 (ss 91M-91Q), headed "Non-citizens with access to protection from third countries".

55 As a result of changes to the Act initiated by the *Migration (Offences and Undesirable Persons) Amendment Act* 1992 (Cth)[67] and the *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act* 1998 (Cth)[68], and post-dating the passage of the Reform Act[69], at the material time for this litigation the Act contained provisions relating to the refusal or cancellation of protection visas "relying on one or more of the following Articles of [the Convention], namely, Article 1F, 32 or 33(2)"[70].

56 The text of Arts 1F and 32 has been set out earlier in these reasons. Article 33(2) states:

> "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

The special provisions made in Art 32 and in Art 33(2) with respect to expulsion "on grounds of national security or public order" (Art 32) and to those who are a danger to security (Art 33(2)) attract comparison with the terms used in Art 1F to identify those to whom the Convention "shall not apply".

57 The reference to Arts 32 and 33(2) may have been included by the legislation identified above for more abundant caution or as epexegetical of Art 1F in its adoption by the Act, with operation both at the time of grant and later cancellation of protection visas. However that may be, the legislation did not go on expressly to adopt Art 33(1). It is upon a particular construction of Art 33(1), with the implied obligation to afford asylum and its qualification with respect to safe third states, that the Minister relies. Accordingly, while the attention of the Full Court in this case was not drawn to the presence in the Act

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67 s 4.

68 Sched 1, Item 20.

69 However, s 4(1) of the *Migration (Offences and Undesirable Persons) Amendment Act* 1992 (Cth) commenced on 24 December 1992 while the relevant provisions of the Reform Act commenced on 1 September 1994.

70 ss 500(1)(c), 500(4)(c), 502(1)(a)(iii), 503(1)(c).

of the references to Arts 32 and 33(2), nothing turns upon it. The presence of these references elsewhere in the Act does not detract from the construction of s 36(2) adopted in these reasons.

58 It would have been open to the Parliament to deal with the question of "asylum shopping" by explicit provisions qualifying what otherwise was the operation for statutory purposes of the Convention definition in Art 1. As indicated earlier in these reasons, such a step may have been taken with the changes to s 36 made by the 1999 Act. The primary change is indicated by sub-s (3):

> "Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national."

There are qualifications expressed in sub-ss (4) and (5). However, the changes made by the 1999 Act were not achieved years earlier by the quite differently expressed alterations made by the Reform Act.

59 The grant of a protection visa to an otherwise unlawful non-citizen removes liability to further detention (s 191) and to removal from Australia (s 198). The adoption by the Act of the definition spelled out in Art 1 of the Convention may have given this benefit to refugees to whom in particular circumstances Australia may not, as a matter of international obligation under the Convention, and upon the proper construction of the Convention, have owed *non-refoulement* obligations under Art 33. But, at any rate before the changes made to s 36 by the 1999 Act, the extending of that benefit had not been foreclosed by the Parliament.

60 The interpretation of the revised s 36 does not arise on this appeal. Nor, as has been mentioned, is it necessary to decide whether the Minister ought to have succeeded in *Thiyagarajah*, not on the ground assigned by the Full Court, but by application of s E of Art 1 of the Convention, as picked up by s 36(2) of the Act.

Orders

61 The appeal be allowed with costs against the Minister. The order of the Full Court be set aside. In place thereof, the appeal to the Full Court be allowed

with costs, the order of Stone J set aside and orders made for certiorari and mandamus to the RRT and for the payment by the Minister of the costs of the appellants of their application under s 39B of the Judiciary Act.

62 The order for certiorari should quash the decision of the RRT in Matter N99/29907 dated 1 March 2002. That for mandamus should require the RRT to determine according to law the application for review of the decision of the delegate of the Minister given on 3 September 1999[71].

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71 *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559 at 579; *Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at 526 [20], 542 [77]. See also *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 at 367-368 [67]-[70]; *Samad v District Court of New South Wales* (2002) 209 CLR 140 at 163-164 [77].

63 KIRBY J. I agree in the orders proposed by Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ ("the joint reasons"). In essentials, my reasons are similar. However, I prefer to found my concurrence on a narrower footing because some of the wider issues mentioned in the joint reasons may, in future cases, return to this Court. That will be the occasion to consider the larger questions and, in particular, the significance (if any) for Australian law of decisions of other countries based on their own distinctive, and constantly changing, legislation[72].

64 The joint reasons acknowledge that it is unnecessary for this appeal to determine all of the matters of construction of the Convention relating to the Status of Refugees, as amended by the Protocol relating to the Status of Refugees[73] (together "the Convention") that their Honours mention[74]. There are now so many cases in this Court and elsewhere concerning the Convention that it seems prudent to limit the elaboration of the Convention and the relevant provisions of the *Migration Act* 1958 (Cth) ("the Act") in this case to the issues that have to be decided to arrive at orders, and to those matters alone.

The facts, legislation and Convention provisions

65 The facts and the decisional history are explained in the joint reasons[75]. There too are set out the critical provisions of the Act as it stood at the time the appellants, father and son, made their applications for a protection visa under s 36(2) of the Act[76].

66 The language of that sub-section is central to the outcome of this appeal. It provided:

> "A criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom Australia has protection obligations under [the Convention]."

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72 See joint reasons at [13]-[21].

73 Convention relating to the Status of Refugees, done at Geneva on 28 July 1951, [1954] *Australian Treaty Series* No 5; Protocol relating to the Status of Refugees, done at New York on 31 January 1967, [1973] *Australian Treaty Series* No 37.

74 Joint reasons at [22].

75 Joint reasons at [1]-[6].

76 Joint reasons at [11].

67 It is true, as stated in the joint reasons, that the Convention, like all other international treaties[77], represents a binding obligation as between the Contracting States. Australia is one such party. In terms of the Convention, Australia owes obligations to the other States that ratified, or acceded to, the Convention. Individual human beings are not, as such, parties to the Convention.

68 However, one of the most significant developments of international law in the past 50 years has been the growth of the recognition of the individual as a subject of international law[78]. The provisions of the Convention (and of other humanitarian and human rights treaties) help to explain the changes in the role of the individual in international law. The terms of the Convention, indeed its very subject matter, make it potentially misleading to deny the existence of protection obligations under the Convention owed to individuals[79]. They are not parties to the Convention; but they are certainly the subjects of the Convention provisions[80]. For my own part, therefore, I do not accept that the Parliament was mistaken (or that it took a "false" step) in describing the subjects of the Convention as "a non-citizen … to whom Australia has protection obligations". Obligations may be owed, in international as in Australian law[81], otherwise than by and to the parties to a binding agreement.

69 However that may be, it is a side issue in this appeal. This is because s 36(2) of the Act is a valid law made by the Parliament under available heads of constitutional power[82]. The provision is not dependent for its constitutional

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77 See Vienna Convention on the Law of Treaties, Art 26.

78 See Brownlie, *Principles of Public International Law*, 6th ed (2003) at 529-557; Weeramantry, *Universalising International Law*, (2004) at 171-172, 178-179. See also Sohn, "The New International Law: Protection of the Rights of Individuals Rather than States", (1982) 32 *American University Law Review* 1; Menon, "The International Personality of Individuals in International Law: A Broadening of the Traditional Doctrine", (1992) 1 *Journal of Transnational Law and Policy* 151; Orakhelashvili, "The Position of the Individual in International Law", (2001) 31 *California Western International Law Journal* 241.

79 cf joint reasons at [27].

80 See, for example, the Convention, Art 2: "Every refugee has duties to the country in which he finds himself". See also Art 3: "The Contracting States *shall* apply the provisions of this Convention *to* refugees" (emphasis added).

81 See, for example, *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107.

82 Constitution, s 51(xix) ("naturalization and aliens"); (xxvii) ("immigration and emigration"); and (xxxix) ("incidental powers").

validity solely upon the extent to which it implements the obligations of the Convention. This Court must therefore accept s 36(2) and give effect to it so as to achieve, so far as its language permits, the purposes the Parliament had in enacting it[83].

70 Clearly, those purposes included to provide legally enforceable entitlements to non-citizens in Australia falling within the class mentioned. The Parliament clearly intended the entitlements of members of that class to be taken seriously and to have meaning and local consequence. The class of persons concerned is those "to whom Australia has protection obligations under [the Convention]". Expressed in that way, it is plain that the Parliament recognised the legitimate entitlements of such persons to "protection". This is a word that is used in the Convention itself[84]. Relevantly, a reference to "protection obligations" under the Convention engages at least the obligations accepted by the Contracting Parties under the Convention that would normally be the primary responsibility of the country of nationality in relation to its own citizens.

71 In respect of a person falling within the Convention definition of "refugee" in Art 1A (and not otherwise excluded), therefore, such protection obligations become "surrogate obligations" of the receiving State so long as, like Australia, that State is a party to the Convention[85]. The obligation imposed by the Parliament on the respondent Minister to grant a protection visa to a person, if satisfied that the criterion described in s 36(2) of the Act is established, confirms that, by Australian law, the Act affords rights to protection to individuals meeting that criterion. In this sense, within Australia, the Convention is given effect and operation in respect of applicants for protection visas up to, and beyond, the mutual obligations of Australia agreed with other Contracting States participating in the Convention. To suggest that "protection obligations" are not owed under the Convention, as such, to people such as the appellants is erroneous both as a matter of Australian and international law. We do not need to say this; and we should not do so.

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83 *Bropho v Western Australia* (1990) 171 CLR 1 at 20; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381-382 [69]-[71]; *Al-Kateb v Godwin* (2004) 78 ALJR 1099 at 1131 [167]; 208 ALR 124 at 167.

84 The Convention, Preamble, Arts 1A(2), 1C(1), 1C(3), 1C(5), 1D, 14.

85 *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1 at 9-10 [17]-[20], 10-11 [22]. See also *Minister for Immigration and Multicultural Affairs v Respondents S152/2003* (2004) 78 ALJR 678 at 682-683 [19]-[20], 700 [109]-[110]; 205 ALR 487 at 492-493, 517.

The supposed ground defeating "protection obligations"

72 The appellants have been accepted by the Refugee Review Tribunal ("the Tribunal") as having satisfied every criterion for the issue of a protection visa, as provided by the Act, except for the suggestion that, in terms of s 36(2), Australia had no "protection obligations" under the Convention towards them[86]. The sole ground why this was said to be the case is that, because the first appellant identifies as (and is considered by others to be) Jewish, he was entitled to travel to Israel and, with members of his family, to take advantage of the *Law of Return* 1950 of the State of Israel[87]. This is a law affording a right for every Jew to go to Israel as an "oleh", being a Jew immigrating to Israel[88]. The immigration of Jews is referred to as "aliyah". The right of "aliyah" is created by Israeli legislation.

73 Obviously, there is no reference to this right in the Convention, nor to the general phenomenon of a right of return of persons of a given ethnicity or religion or other class of persons to States so providing in their municipal legislation. On these matters the Convention contains no express provisions. Any supposed consequence of such municipal laws for the operation of the Convention, and the protections which it provides, is left to implication, if to anything, or to the legislation of States participating in the Convention not inconsistent with the Convention.

74 According to the unchallenged finding of the Tribunal in the present case[89]:

> "[A] Jew who has come to Israel and subsequent to his arrival has expressed his desire to settle in Israel may, while in Israel, receive an *oleh's* certificate. According to paragraph 4A(a) the rights of a Jew under this Law and the rights of an *oleh* under the Nationality Law, as well as the rights of an *oleh* under any other enactment are also vested in a child and a grandchild of a Jew and the spouse of a grandchild of a Jew, except for a person who has been a Jew and voluntarily changed his religion. Paragraph 4B. For the purposes of this Law 'Jew' means a person who was born of a Jewish mother or has become converted to Judaism and who is not of another religion. The Israeli authorities issue these emigrants

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86 Joint reasons at [11].

87 The *Law of Return* bears the year 5710 in the Jewish calendar.

88 *Law of Return*, s 1.

89 Decision of the Tribunal, 27 March 2002, Reference N99/29907 at 12 ("the Tribunal decision").

actual Israeli citizenship, not merely the right to acquire it. See: *US State Department Report 1997*.

The Tribunal also noted that information from the Israeli Embassy and also from [the Immigration and Absorption Board of Israel] internet site indicate that a Jew is able to travel to Israel and obtain aliya [sic] on arrival in Israel.

… According to the Israeli Immigration and Absorption Board ...

'... Essentially, all Jews everywhere are Israeli citizens by right.'"

75 There is no single answer to the question: "Who is a Jew?"[90] There are different views as to whether matrilineal descent is necessary, or what form any conversion must take[91]. However, since the *Law of Return* was amended in 1970 to define "Jew", in response to the controversial judgment in *Shalit v Minister of the Interior*[92], it is clear that the *Law of Return* requires a person to be born of a Jewish mother, or to convert to Judaism, to be considered a "Jew" for the purposes of returning to Israel as an "oleh" and obtaining Israeli citizenship[93]. The first appellant's wife is not a Jew by that description. Therefore, for the purposes of the *Law of Return*, neither are his children (including the second appellant). Nonetheless, being a "child of a Jew", the second appellant falls within the *Law of Return*, as found by the Tribunal. The appellants thus, together and separately, have a *prima facie* entitlement to claim nationality status in the State of Israel. This has been so at all relevant times, including since their arrival in Australia.

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90 In *Shalit v Minister of the Interior* (1968) *Selected Judgments of the Supreme Court of Israel (Special Volume, 1962-1969)* 35 at 91, Landau J said: "[F]or [a] section of the population ... being a Jew depends solely upon ... birth to a Jewish mother ... Another camp exists ... that rejects this test utterly." In the same case (at 71-72), Sussman J said that "it is now accepted that the expression 'Jew' has no single definite and continuing meaning".

91 See Baker, "Who Is a Jew? The Dilemma of Israel", (1970) 12 *Journal of Church and State* 189; Akzin, "Who Is a Jew? A Hard Case", (1970) 5 *Israel Law Review* 259. See also Savir, "The Definition of a Jew Under Israel's Law of Return", (1963) 17 *Southwestern Law Journal* 123.

92 (1968) *Selected Judgments of the Supreme Court of Israel (Special Volume, 1962-1969)* 35.

93 *Law of Return*, s 4B. This was inserted by the *Law of Return (Amendment No 2)* 1970.

76 Neither of the appellants wishes to immigrate to Israel for a number of reasons, including that they have never been to Israel, they do not speak Hebrew, they have an apprehension of discrimination against non-Jews (and that this would negatively affect the first appellant's wife, and the second appellant) and the existence of a strong desire to continue their pacifist beliefs and avoid compulsory military service. But to the Minister, this disinclination on the part of the appellants is legally irrelevant. The Convention is an imposition of obligations upon Contracting States. Such obligations extend only so far as the Convention provides. A Contracting State may not "expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"[94]. But in this case, there is no intention to return the appellants to Russia, the country of their nationality, either on the part of Australia or of the State of Israel, which the Tribunal found had received more than 800,000 Jews from Russia and the other former Soviet republics since the late 1980s[95]. Because of the apparent availability of this right of return to Israel, the Minister contends that, in terms of s 36(2) of the Act, Australia has no "protection obligations" towards the appellants under the Convention.

77 The Minister's construction of the Act, read in the light of the Convention, and with regard to the purposes of both the Act and the Convention, is a strained one. I would reject it. Essentially there are four reasons.

Reasons for rejecting the Minister's construction

78 *Plain language of the Act*: All that is required to enliven the entitlement to a "protection visa" is, relevantly, the three preconditions stated in s 36(2) of the Act. The applicant must be a "non-citizen" of Australia. He or she must be in Australia. And Australia must have "protection obligations" under the Convention towards the applicant.

79 Here, the appellants clearly satisfied the first and second preconditions. The Tribunal found that because, in Russia, the appellants were both regarded as Jewish and because of the first appellant's political activities and opinions, they had a genuine fear that they would be persecuted were they returned to Russia. Therefore, the "protection obligations" under the Convention are enlivened. There is nothing expressly stated in the Convention that puts the appellants outside the protections for which it provides. It is the Minister who must seek to import into the Convention, or into the terms of the Act, in a case such as the

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94 The Convention, Art 33(1).

95 Tribunal Decision at 11.

present, an exception to Australia's "protection obligations" that is not expressly spelt out.

80 Most specifically, there is imposed on Australia under the Convention the obligation not to expel a "refugee" lawfully in Australian territory, save on grounds not here relevant[96]. And not to expel or return a "refugee" in "any matter whatsoever to the frontiers of territories where his life or freedom would be threatened"[97]. It follows that, on the findings made by the Tribunal, both of these "protection obligations" have descended on Australia in respect of each of the appellants. There are many other duties imposed on Australia that answer to the description of "protection obligations", the formula chosen by s 36(2) of the Act.

81 I agree, for the reasons stated by the other members of the Court, that it is impossible to read the plural expression "protection obligations" so as to exclude the appellants from the ambit of the various Convention protections[98]. The mere fact that sending the appellants to Israel might not of itself breach Australia's obligations under Art 33(1) of the Convention does not relieve Australia of the many other "protection obligations" that remain to be fulfilled in respect of the appellants whilst they are in Australia, and whilst s 36(2) is engaged in their case.

82 *The legislative history*: The foregoing conclusions, which derive from nothing more than the language of s 36(2) of the Act and the terms of the Convention – and particularly the plural description of the "protection obligations" stated in that sub-section – are reinforced by the legislative history that preceded the enactment of s 36(2). Such history is commonly taken into account by courts in seeking to elicit the purpose of Parliament in enacting provisions such as it did.

83 It is important to note that the description of the criterion for a protection visa, in terms of the "protection obligations" owed by Australia to the specified individuals, is a deliberate choice made by the Parliament. Originally, as the joint reasons explain[99], the statutory provisions for the grant of refugee status, replacing previous administrative arrangements, were expressed by reference to a determination by the applicable Minister of whether the applicant was, or was not, a "refugee" within the terms of the Convention[100]. This approach to

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96 National security or public order: the Convention, Art 32(1).

97 The Convention, Art 33(1).

98 Joint reasons at [27]-[31].

99 Joint reasons at [35]-[38].

100 See the Act, s 6A(1)(c), introduced by the *Migration Amendment Act (No 2)* 1980 (Cth), s 6. Set out in joint reasons at [36].

enlivening the criterion for the grant of a visa to permit an applicant claiming to be a "refugee" to stay in Australia, by reference to status as a "refugee" in terms of the Convention, was continued through subsequent amendments of the Act. Only when the Act was changed by s 10 of the *Migration Reform Act* 1992 (Cth) were the predecessors to ss 36 and 65 of the Act as now appearing introduced[101]. Only then was the statutory definition of "refugee" in s 4 repealed.

84 This course of legislation makes it clear that the Parliament deliberately embarked on the adoption of a new criterion for refugee applicants seeking to remain in Australia. The three-fold test, now applicable in s 36(2) of the Act, was introduced. It was sufficient that the non-national in Australia should be a person who fitted into the class of someone to whom Australia owed "protection obligations". This is a very wide expression. Whatever negative implications might be added, as a gloss, to the definition of "refugee" in the Convention, none could cut back the wide class so defined. The existence of "protection obligations" was sufficient. And by the Convention, they are expressed in large and multiple forms. They applied to the appellants. They were not disapplied by the fact that other countries might or might not, under their several laws, be willing, or even bound, to receive them. The focus of the Act was shifted to Australia's "protection obligations". In this case, those obligations were enlivened.

85 *Subsequent amendment of the Act*: To reinforce the foregoing construction of s 36(2) of the Act, by reference to its history, regard may also be had to amendments to s 36 that have been added to the Act to spell out a specific withdrawal of "protection obligations" on the part of Australia in the case of certain non-citizens able to secure protection in "safe third countries"[102].

86 The idea expressly to withdraw "protection obligations" in such a case was first manifested with effect from 15 November 1994, with the insertion of subdiv AI in Pt 2, Div 3 of the Act[103]. This amendment introduced s 91E into the Act, preventing specified non-citizens, to whom the subdivision applied, from applying for a protection visa. The specific target of the amendments was persons covered by the Comprehensive Plan of Action approved by an international conference on Indo-Chinese refugees[104]. The amendments

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101 The Act, ss 26B(2) and 26ZF (since renumbered).

102 See *Hunter Resources Ltd v Melville* (1988) 164 CLR 234 at 254-255 per Dawson J (and authorities cited therein).

103 *Migration Legislation Amendment Act (No 4)* 1994 (Cth).

104 The Act, s 91B(1).

envisaged agreements relating to persons seeking asylum between Australia and another country or countries that fall in the category of a "safe third country".

87 With effect from 16 December 1999, s 36 of the Act was further amended by the addition of sub-ss (3)-(7)[105]. The added sub-sections have no application to the appellants. This is so because the amendments apply only to applications for visas made on or after their commencement. They do not affect the appellants' applications which were made on 16 July 1999. Nevertheless, it is worth noting the terms of the following sub-sections:

> "*Protection obligations*
>
> (3) Australia is taken not to have protection obligations to a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.
>
> (4) However, if the non-citizen has a well-founded fear of being persecuted in a country for reasons of race, religion, nationality, membership of a particular social group or political opinion, subsection (3) does not apply in relation to that country.
>
> (5) Also, if the non-citizen has a well-founded fear that:
>
> (a) a country will return the non-citizen to another country; and
>
> (b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion;
>
> subsection (3) does not apply in relation to the first-mentioned country."

88 Although the foregoing and other later amendments[106] to the Act do not control the interpretation of s 36(2) in the present case, they do demonstrate that legislative techniques are available which might have been used by the Parliament to limit the scope of the "protection obligations" owed by Australia.

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105 *Border Protection Legislation Amendment Act* 1999 (Cth), Sched 1, Pt 6, Item 65.

106 See *Migration Legislation Amendment Act (No 6)* 2001 (Cth), Sched 1, Pt 1, Item 2 (commenced 1 October 2001); *Migration Legislation Amendment (Judicial Review) Act* 2001 (Cth), Sched 1, Pt 1, Item 5 (commenced 2 October 2001).

They had not been used, and were not in force, in relation to the appellants at the time of their applications. This Court should not strain itself to import such limitations or restrictions on Australia's "protection obligations" with respect to the appellants when the Parliament, with the power to do so, has not enacted them expressly.

89 *Approach to construction*: The foregoing considerations of statutory interpretation are reinforced by a final one. The Convention constitutes an important means of protection for the human rights and fundamental freedoms of refugees who claim such protection as non-citizens in Australia. The Parliament, by the terms of ss 36(2) and 65(1) of the Act, has given effect, in domestic law, to Australia's accession to the Convention. Ordinarily, this Court would give a meaning to such a provision so as to ensure that Australia's international obligations were thereby carried into full effect[107]. As I stated in *Coleman v Power*[108], "where words of a statute are susceptible to an interpretation that is consistent with international law, that construction should prevail over one that is not". That, in my opinion, is how s 36(2) is to be construed.

90 Because there is nothing in the Convention, either expressly or by implication, to remove from Australia its protection obligations with respect to the appellants, as accepted there, in circumstances where, although the Convention is engaged in the State to which the applicant has had recourse, the applicant might have obtained protection elsewhere, such obligations continue to exist. But should a negative implication be read into the Convention in a case such as the present? I think not.

91 The notion can be tested this way. It would suggest that no Contracting State ever has "protection obligations" to a refugee who may (on whatever basis) be entitled by law to protection by another State. For example, the constitutions of numerous countries create rights to seek and obtain asylum[109]. Specifically,

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107 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [29] per Gleeson CJ; *Coleman v Power* (2004) 78 ALJR 1166 at 1171-1173 [17]-[24] per Gleeson CJ, 1209-1212 [240]-[249] of my own reasons; 209 ALR 182 at 189-191, 241-245.

108 (2004) 78 ALJR 1166 at 1209 [240]; 209 ALR 182 at 241. See also authorities cited in fn 230.

109 See, for example, Constitution of the Republic of Albania, Art 40; Constitution of the Republic of Bulgaria, Art 27(2); Constitution of Georgia, Art 47; Constitution of the Republic of Hungary, Art 65; Constitution of the Italian Republic, Art 10; Constitution of the Republic of Namibia, Art 97; Constitution of the Slovak Republic, Art 53. See also Constitution of Finland, s 9. See Flanz (ed), *Constitutions of the Countries of the World*.

until 1993, the *Grundgesetz* (The Basic Law for the Federal Republic of Germany) provided that "[p]olitically persecuted individuals enjoy the right of asylum"[110]. This was an "absolute right"[111] and included the rights of entry and *non-refoulement*[112]. The Minister argued that the issue in this appeal was whether s 36 of the Act "conferred an entitlement to a protection visa upon persons who have a well-founded fear of being persecuted for a Convention reason in their country of nationality but who have the right to enter, and settle in, a third country in which they do not have a well-founded fear of persecution or of expulsion". If the Minister's argument were accepted, and if the Minister's argument with respect to the *Law of Return* were applied to the German Constitution as it stood before 1993, it would seem to follow that Australia would never have owed protection obligations to *any* person. All such persons would have had a right to asylum in Germany. It would be an absurd result if the generosity of other States' refugee laws meant that Australia was thereby relieved of international obligations that it voluntarily accepted with other nations. Such a result should not be reached by implication. It could not have been what was intended by Parliament when it enacted s 36(2).

92 I agree with the submission for the appellants that such a principle would render the Convention self-destructive. It would deprive the Convention of the practical effect that it was intended to have in the case of vulnerable persons such as the appellants who can establish that the Convention criteria apply in their case in the State where they have arrived and in which they claim the benefit of such protections.

93 The notion of an implied exclusion of "protection obligations" is one that would, if given effect as part of the Convention scheme, potentially send applicants for refugee status shuttling between multiple countries. Their entitlements under the Convention would be hostage to arrangements purportedly

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110 The Basic Law for the Federal Republic of Germany, Art 16.

111 Hailbronner, "Asylum Law Reform in the German Constitution", (1994) 9 *American University Journal of International Law and Policy* 159 at 159. Hailbronner notes that the amendments to Art 16 "maintain the individual right of asylum" but restrict "unfounded asylum applications and asylum seekers entering from safe third countries": at 160. Hailbronner further clarifies that "for German authorities to reject an asylum application under the safe third state clause, an asylum seeker must have had actual contact with the territory of the safe third country and must have had the opportunity to apply for asylum in that country": at 162.

112 See "Review of Foreign Laws", (1982) 3 *Michigan Yearbook of International Legal Studies* 553 at 567.

made affecting their nationality by countries with which they may have no real connection. It would shift obligations clearly imposed by international law to contingencies that, in some cases, may be imponderable. It would introduce a serious instability and uncertainty of "protection obligations" into the Convention's requirements. Without clear language in the Convention to support such a course, I would not introduce such relief from Convention "protection obligations" by a process of implication inimical to the Convention's objectives, terms and practical operation.

94 I leave aside a case where a refugee applicant has a clearly established entitlement to protection which has been exercised and engaged before resort to Australia, as in a case of transit. Such were the factual circumstances in *Minister for Immigration and Multicultural Affairs v Thiyagarajah*[113]. Those facts are quite different from the present case. Neither of the appellants in this case has ever been to Israel. Neither has any personal connection with that country. Neither has ever claimed or exercised a "right of return" as provided by Israeli law. The notion that such a municipal law (which is not unique to Israel) could cut a swathe through the international obligations assumed under the Convention is not one that is easily reconciled either with the Convention's language or its purpose.

95 Least of all is it an attractive notion in the case of a refugee who is a Jew, claiming protection under the Convention including on the basis of his status as a Jew. Historically, the Convention was, in part, a response of the international community to the affront to the international conscience caused by the mass migrations that occurred in Europe before, during and immediately after the Second World War[114]. In discussing key influences on the Convention, Professor Walker states that by "1938, as the position of the Jews in Germany became worse, the Evian Conference was convened to try to provide a solution. The Conference was largely a failure, though it did produce the [Inter-Governmental Committee on Refugees (IGCR)] ... The IGCR was the first organization to have a definition of refugee that expressly referred to threats to life or liberty on the basis of race, religion or political opinion. This was subsequently picked up in the definition used in the [International Refugee Organization] Constitution after

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113 (1997) 80 FCR 543.

114 Steinbock, "Interpreting the Refugee Definition", (1998) 45 *UCLA Law Review* 733 at 766; Walker, "Defending the 1951 Convention Definition of Refugee", (2003) 17 *Georgetown Immigration Law Journal* 583; Musalo, "Claims for Protection Based on Religion or Belief", (2004) 16 *International Journal of Refugee Law* 165 at 166; Deng, "International Response to Internal Displacement: A Revolution in the Making", (2004) 11(3) *Human Rights Brief* 24.

the War, and then again in [the Convention]."[115] At least four Jewish organisations were involved in the drafting of the Convention[116].

96 In part, the Convention sought to repair, and prevent recurrences of, the injustices suffered by Jewish refugees during that time. Notoriously, many of them were shipped from pillar to post, searching often fruitlessly for a place of refuge[117]. The *Law of Return* in Israel is, itself, also in part a response to that historical period[118]. It would be astonishing if the *Law of Return* could now be used to force a person to migrate to Israel. Article 2(b) of the *Law of Return* states that an "oleh's visa shall be granted to every Jew who has *expressed his desire* to settle in Israel" (emphasis added). Given that the *Law of Return* aimed to facilitate the provision of a place for Jews to "finally have a place to be free from persecution"[119], it would be surprising if it now had the effect that all Jews fleeing persecution anywhere were obliged to go there, even if doing so was contrary to their "desire"[120].

97 It would also be astonishing if the enactment by the State of Israel of the *Law of Return*, without more, meant that the Convention's "protection

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115 Walker, "Defending the 1951 Convention Definition of Refugee", (2003) 17 *Georgetown Immigration Law Journal* 583 at 590 (footnote omitted).

116 See Takkenberg and Tahbaz, *The Collected Travaux Préparatoires of the 1951 Geneva Convention relating to the Status of Refugees*, (1990). The groups included the Co-ordinating Board of Jewish Organizations, the Agudas Israel World Organization, the Consultative Council of Jewish Organizations and the World Jewish Congress.

117 A well-known instance involved the vessel *St Louis*, "when the United States rebuffed fleeing Jewish refugees who had arrived at New York and Miami harbors, forcing many back to die in Nazi gas chambers": see Koh, "Reflections on *Refoulement* and *Haitian Centers Council*", (1994) 35 *Harvard International Law Journal* 1 at 7, citing Thomas and Morgan-Witts, *Voyage of the Damned*, (1974).

118 Altschul, "Israel's Law of Return and the Debate of Altering, Repealing, or Maintaining its Present Language", (2002) 5 *University of Illinois Law Review* 1345 at 1349.

119 Altschul, "Israel's Law of Return and the Debate of Altering, Repealing, or Maintaining its Present Language", (2002) 5 *University of Illinois Law Review* 1345 at 1349.

120 On the relationship between a "desire" to return, and the *Law of Return*, see *Katkova v Canada (Minister of Citizenship and Immigration)* (1997) 130 FTR 192 at 193-194 [3]-[5], 198-200 [23].

obligations", accepted by other countries, were thereby withdrawn throughout the world, by implication and not express terms, from application to all persons who were, or might be, classified as Jewish. This is especially so, given the role of Jewish organisations in drafting the Convention, and given that the definition of "refugee" was directly influenced by the Nazi persecution of Jews.

98 It would require the clearest language of the Convention to have such a discriminatory operation. Far from being clear, the Convention, in its terms, does not withdraw its protection from applicants, otherwise "refugees", who happen to be of Jewish religion or ethnicity or any other religion or ethnicity that might somewhere fall within some other country's unilateral enactment of return rights. Jews, however defined, are protected by the Convention like everyone else. The enactment of the *Law of Return* by the State of Israel does not deprive them of that protection which derives from the international law expressed in the Convention. As far as I am concerned, any ambiguity that might exist in the Convention (or the Act) must be construed to prevent such an unjust operation.

Conclusion: clear protection obligations

99 It may be that issues will arise in the future under exclusion provisions of Australian statutes, which will present questions of ambiguity. But so far as s 36(2) of the Act is concerned, as operating at the time of the appellants' application, there was no such ambiguity. It is clear. Australia had undoubted "protection obligations" to the appellants. By the findings of the Tribunal in their case, the appellants were therefore entitled to protection visas. The supposed ground of implied disqualification was erroneous. I do not criticise the Tribunal, which properly followed what it took to be a general principle stated by the Federal Court in *Thiyagarajah*[121] and followed in many other Federal Court decisions referred to by the Tribunal[122]. However, at the very least, that principle was stated too broadly in the reasons in that case. In this case, it requires correction and refinement by this Court.

Orders

100 I therefore agree in the orders proposed in the joint reasons.

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121 (1997) 80 FCR 543.

122 Tribunal decision at 14.